WAKE FOREST UNIVERSITY CEEB Code = 5885 FICE Code = 002978 Email: registrar@wfu.edu Website: registrar.wfu.edu Phone: (336) 758-5207 Fax: (336) 758-6056
For questions or further information, contact the Office of the University Registrar at PO Box 7207, Winston-Salem, NC 27109. The Office of the University Registrar issues official transcripts for all Undergraduates and the Graduate, Divinity and Business Schools.

VALUE SYSTEM

From Fall 1975 to Summer 2001, the undergraduate school awarded course credits. Credits may be converted into conventional semester hours by multiplying the assigned credits by 0.9 (i.e., 4 credits= 3.6 semester hours). Students matriculating in the undergraduate schools beginning in Fall 2001 receive semester hours. The Graduate and Divinity Schools award conventional semester hours.

After Fall of 1998, the undergraduate and graduate schools changed to a plus/minus grading scale. At that time, the Graduate School also changed from a 3.00 point scale to a 4.00 point scale. Graduate students who matriculated before Fall 1998 but were still enrolled as of Fall 1998 had all earlier grades converted to the 4.00 point scale.

TRANSFER CREDITS

Transfer credit may be counted toward the graduation requirements, but grades earned in the transfer course are not used in calculating the Wake Forest grade point average. The grades appearing on the Wake Forest transcript are the actual grades earned, but the units shown are only those accepted for transfer by Wake Forest.

Departmental abbreviations are listed in the Bulletins. Some courses transferred from other institutions may have abbreviations not found in the Bulletin.

Repeated courses are flagged I (included in GPA) or E (excluded in GPA). For classes taken and repeated at Wake Forest, only one grade remains in the cumulative grade point average, based on Bulletin regulations.

DEFINITION OF GRADES AND GRADE POINT VALUES

UNDERGRADUATE

Calculated in grade point average:

Grade	Definition	Points
A	Exceptionally high achievement	4.00
A-		3.67
B+		3.33
B	Superior	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D+		1.33
D		1.00
D-	Passing but unsatisfactory	.67
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn Failing	.00
F.	Irreplaceable F	.00

Not calculated in grade point average:

EX	Exemption
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
AU	Audit
DR	Official drop approved by the Dean
NC	Non-credit non-graded course
WD	Withdrawal from the university
T (grade)	Transfer Credit
TNS	Dual-Enrollment Transfer Credit
W	Course Withdrawal

GRADUATE

Starting with the fall 1997 semester, graduate level courses changed from 300, 400, and 500 level courses to the current 600, 700, and 800 level courses.

System Prior to Summer 1998

Calculated in grade point average:

Grade	Points per Hour
A	3.00
B	2.00
C	1.00
F	0.00

Not calculated in grade point average:

Grade	Definition
P	Passing
F	Failure in Pass/Fail mode
NR	Not reported in Satisfactory/Unsatisfactory mode
I	Incomplete in Satisfactory/Unsatisfactory mode
S	Satisfactory
U	Unsatisfactory
AUD	Audit
DRP	Drop approved by the Dean after regular drop period
NC	Non-credit non-grade courses
WP	Withdraw Passing
WF	Withdraw Failing

System after Summer 1998

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Good	3.00
B-		2.67
C+		2.33
C	Low Passing	2.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00

Not calculated in grade point average:

ISU	Incomplete in Satisfactory/Unsatisfactory grade mode
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
NR	Not reported in Satisfactory/Unsatisfactory mode
S	Satisfactory
U	Unsatisfactory
AU	Audit
DR	Official drop approved by Dean
NC	Non-credit non-grade course
WD	Withdrawal from the University
WF	Withdrawal Failing
WP	Withdrawal Passing

DIVINITY

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Commendable	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D	Unsatisfactory	1.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn Failing	.00
F.	Irreplaceable F	.00

Not calculated in grade point average:

P	Passing
FPF	Failure in Pass/Fail mode
IPF	Incomplete in Pass/Fail mode
NRPF	Not reported in Pass/Fail mode
AUD	Audit
DR	Official drop approved by Dean
WD	Withdrawal from the university
WP	Withdrawal Passing

BUSINESS (Graduate)

Students who began the program prior to July 2009, are graded on a 9-point grading system. Students admitted after that date are graded on a 4-point grading system.

Calculated in grade point average:

4 Point Grading System:

Grade	Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
F	.00

Not calculated in grade point average:

I	Incomplete
P	Pass/Fail Course
AU	Audit
WD	Withdrawn from the University
WP	Withdrawn passing from a course
WF	Withdrawn failing from a course
E	Exempt from a course
T	Course transfer
X	Course waived

9 Point Grading System:

Grade	Points
A+	9
A	8
A-	7
B+	6
B	5
B-	4
C+	3
C	2
C-	1

June 12, 2023

The Honorable John Walker, Jr.
Connecticut Financial Center
157 Church Street, 17th Floor
New Haven, CT 06510-2100

Dear Judge Walker:

This letter provides my recommendation for Mary Triplett, who is applying for a clerkship in your chambers. By way of preview, Ms. Triplett is smart, hard-working, and creative law student. I am confident that she will make an excellent judicial clerk.

Ms. Triplett was a student in my first-year Civil Procedure course in Fall 2021 and she is currently a two-semester directed research project with me. Ms. Triplett received an "A" on the civil procedure exam. Her answer reflected an astonishingly sophisticated command of the material. She was able to analyze the complex questions of constitutional and statutory law using theories of interpretation (textualism, purposivism, intentionalism, etc.). As you likely know, very few law students achieve that level of sophistication during the law school careers. To achieve this level of mastery in the first year of law school is very rare indeed. Virginia has a very strict curve. There were five grades of A, which was the highest grade that I awarded.

Ms. Triplett is currently working on a directed research project on the relationship of the Privileges or Immunities Clause to rights of reproductive autonomy. This project investigates the relationship between the reorientation of the Supreme Court towards originalism and the Dobbs case, which contains a brief discussion of the Privileges or Immunities Clause in footnote 22 of the majority opinion, as well as a concurring opinion by Justice Thomas that touches on the clause. Ms. Triplett's research focuses on originalist theories of the Privileges or Immunities Clause and their implications for Dobbs. The prevailing originalist view of the clause is that it secures basic rights such as the rights to contract, own property, and speak freely. Because regulation of abortion limits various basic rights, including the right to contract for medical services, the right to make medical decisions, and the right to control one's own body, the first step in making out a claim is satisfied. After several meetings with Ms. Triplett, I am confident that her paper will be deep and interesting.

Ms. Triplett is a very personable and down-to-earth young woman. Because Civil Procedure is a small section class, I get an opportunity to observe interactions between the students. Ms. Triplett also attended office hours frequently. She is well liked by her peers. I am confident that she would interact positively with her co-clerks and your staff.

In short, Ms. Triplett is a great prospect. I hope that you will interview her!

Sincerely,

/s/

Lawrence B. Solum
William L. Matheson and Robert M. Morgenthau
Distinguished Professor of Law
Douglas D. Drysdale Research Professor of Law
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June 12, 2023

The Honorable John Walker, Jr.
Connecticut Financial Center
157 Church Street, 17th Floor
New Haven, CT 06510-2100

Dear Judge Walker:

I am writing on behalf of Mary Triplett, who has applied for a clerkship in your chambers. It is a pleasure to recommend Mary. She is super smart, hard-working, eager to learn, and always looking for a challenge. Her talent and upside potential are both extremely high. In 2024, she will be clerking for Judge T.S. Ellis in the U.S. District Court for the Eastern District of Virginia, and I recommend her to you without hesitation and with the greatest enthusiasm for a clerkship to follow.

Mary was terrific in my course, Constitutional Law II: Religious Liberty, in the fall of 2022. I had 72 students in that class, including most of the top-25 second-year law students. In class, Mary showed mastery of the doctrine. Her answers cut to the core of issues, and she stood out for the clarity of her responses, especially given the uncertain and sometime chaotic state of First Amendment doctrine. Her exam was similarly excellent. I had a fair amount of compression in this class, and I gave Mary an A-. As a matter of policy, I don't tend to bump up A- grades, but if anyone deserved it based on in-class performance, she certainly did.

After talking with Mary extensively throughout the semester, I hired her as part of a team of research assistants to work on religious freedom and reproductive rights. I asked Mary to review the legislative history of various state prohibitions on abortion and to determine whether there was evidence of what the Supreme Court might consider a breach of religious neutrality under its Free Exercise Clause doctrine (after its 2018 decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission). Mary also investigated the legislative history of the federal Religious Freedom Restoration Act (RFRA), exploring why the statute covers conduct that is motivated by religious commitments, even if that conduct is not deemed to be religiously obligated or compelled. Her research was comprehensive, careful, and immediately useful. She also worked with another student to edit the draft of an article that I have co-authored with my colleague, Richard Schragger, on these issues. Mary has a sharp eye as an editor and returned quickly with meticulous comments and corrections. (In the next year, I have two edited volumes with Oxford University Press in the works, and I would be lucky if I can convince Mary to stay on board for another round or two of editing.)

Mary's performance in my class and as my research assistant are consistent with her overall record of academic excellence. As an undergraduate at Wake Forest, she majored in mathematical economics and graduated with a cumulative GPA of 3.93. After four semesters at Virginia, she has continued to perform at a very high level. Her current GPA is 3.77, which puts her in the top 10% of her class. But that does not really tell the whole story. In my view, Mary's grades understate her intellectual abilities. This past semester, she had basically straight As (four A's and one A-), and that strikes me as a more accurate representation. She is stronger now than she when she started law school. She is rising to meet the competition level and hitting her stride. I would expect her to finish near or within the top 5% of her class.

On a personal note, if you meet her, I think you will find Mary to be incredibly likeable. She is a go-getter and a team player. In saying that, I have one brief story to add: Mary played this year in the Public Interest Law Association (PILA) annual student-faculty basketball game. I played on the faculty team, which won for the first time in more than a decade. But Mary was terrific on the other side. She is a surprisingly good basketball player. She knows the game and is obviously trusted and well-liked by her teammates. She is also tough—not afraid to give a foul if necessary! (I have Mary to thank for my one point in the game, after shooting 50% from the free throw line.)

Mary Triplett has everything I would look for in a clerk: intellectual firepower, clarity of thought, work ethic, and attention to detail. She obviously enjoys working with others, and, most importantly, she is going to exercise good judgment. She will be a trustworthy and dependable clerk.

I would hire Mary every day. She has the makings of an outstanding lawyer, and I hope you will give her the most careful consideration. If you have any questions, please feel free to reach me at 434-924-7848.

Sincerely,

/s/

Micah J. Schwartzman
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May 31, 2023

The Honorable John Walker, Jr.
Connecticut Financial Center
157 Church Street, 17th Floor
New Haven, CT 06510-2100

Dear Judge Walker:

I write to recommend Mary Triplett, who is a clerkship applicant. Mary is a 2L at the University of Virginia School of Law, and I taught her last semester in History of American Federalism. Mary is sharp and perceptive, a hard and diligent worker, and an excellent communicator – all traits that suggest that she will make an excellent law clerk.

Mary earned an A in the course last semester. Our classes are graded on a strict curve, and so Mary's performance put her at the top of the class. The History of American Federalism class was a medium-sized class of 25 students. It was something of an experiment – a happy one – as it was the first time I've taught the course. This was a writing-intensive class. Students were required to write three papers over the course of semester analyzing the doctrine and the history we'd discussed in class. The paper assignments were roughly chronological, with the first one covering the founding era and the early republic, the second focused on the changes wrought during the Progressive Era and the New Deal, and the third on the emergence of modern federalism doctrine since the Civil Rights movement. Mary wrote three very good papers, each better than the next. I gave students a good deal of written feedback on the papers, and Mary took the feedback on the first two and steadily integrated it into the next paper. On her first effort, Mary had good points and smart insights, but she backed into her major claims. Over the course of her next two papers, she got better and better at making a compelling argument and using the material we'd read to provide revealing examples to back up her argument. Not only is Mary an excellent writer, she's also adept at legal analysis – both at the level of individual cases and at the more comprehensive task of relating cases to one another. Perhaps even more important, Mary really responds well to feedback. After her first paper, Mary came to see me to talk through both that paper and the next one. She grew as a writer over the course of the semester, which is always a joy for a teacher to see.

Mary also stood out in the classroom. She was quick to volunteer to talk about individual cases, but also took risks. When I asked more open-ended questions, inviting students to evaluate scholars' claims, or to venture their own theories about change over time or doctrinal incongruities, Mary volunteered too. She was an active learner, someone who learned by venturing thoughts and engaging in discussion and then refining her ideas. I wish more students would do what Mary did, which is to lean in and take as much as possible from the classroom discussion instead of letting the ideas just wash over her. She was a delight to have in class, because she engaged and experimented and thought out loud.

I also had students work in groups once or twice over the course of the semester, so I had the chance to observe Mary working with her peers. She was again an excellent participant. She worked well with others and listened and learned and offered her own views, elevating the group's performance. Mary is a collaborator, which was evident both in her interactions with other students and with me. These are skills that will serve her extremely well as a law clerk. Mary has always struck me as a person who is ambitious, respectful, and very personable. She's someone who will treat a clerkship as an opportunity to learn and to contribute and she will take both roles seriously.

I would be happy to talk about Mary's candidacy further and to answer any questions you might have. Please feel free to contact me at cnicoletti@law.virginia.edu or at (434) 243-8540.

Sincerely,

Cynthia Nicoletti
Class of 1966 Research Professor of Law

Writing Sample

This writing sample is an essay that I wrote for my Federal Sentencing course in the fall of 2022. In this piece, I argue that district courts should be permitted to view the non-stacking provision of the First Step Act as a factor that may warrant compassionate release for defendants sentenced under 18 U.S.C. § 924(c).

I. Introduction

Congress enacted 18 U.S.C. § 924(c) to deter criminals from using firearms in the commission of an otherwise violent crime. Originally, this statute established a mandatory sentence of one to ten years for first-time offenders who used or carried a firearm during a crime of violence. A second conviction under § 924(c) also triggered a mandatory minimum penalty of five years. However, the Supreme Court's decision in *Deal v. United States* interpreted the statute's penalty for a "second or subsequent conviction" to apply to multiple convictions within the same indictment, even if the offenses were committed minutes apart.[1] This prosecutorial tactic of charging defendants with several counts under § 924(c) is referred to as "stacking." Over the next decade, Congress vastly expanded the number of underlying crimes to which § 924(c) attaches—including to reach drug trafficking offenses. Then, legislators dramatically increased the sentencing structure within the statute itself. As a result, prosecutors could stack § 924(c) charges to penalize first-time offenders with egregiously long sentences, in many cases upwards of fifty years in prison. But in 2018, Congress passed The First Step Act, which ended mandatory stacked sentencing under § 924(c). Since this change did not apply retroactively, offenders moved for sentence reductions under the compassionate release statute instead. In response, circuit courts have split on the question of whether district judges may find that these sentencing changes constitute an "extraordinary and compelling reason" for early release.

District courts should be permitted to view the elimination of mandatory stacked sentencing under § 924(c) as one factor that may warrant compassionate release. First, the compassionate release statute and the sentencing guidelines give district courts wide discretion in evaluating individual petitions by directing them to conduct a holistic evaluation of each offender's

[1] Deal v. United States, 508 U.S. 129 (1993).

circumstances. Further, neither the statutory text nor the United States Sentencing Guidelines preclude judges from considering legislative changes in this context. Finally, this interpretation furthers the original purpose of the statute by remedying the effects of increasingly harsh penalties that were implemented over time.

II. Background and History of 18 U.S.C. § 924(c)

A. The Original Statute

18 U.S.C. § 924(c) was initially passed as an amendment to the Gun Control Act of 1968.[2] First discussed on the house floor, the original proposal provided for the seizure and forfeiture of any "firearm or ammunition . . . used or intended to be used in, any violation of this chapter, or a rule or regulation promulgated thereunder, or any other criminal law of the United States."[3] Notably, this initial proposal only penalized offenders by seizure of their weapons—not by imprisonment. Representative Casey of Texas then proposed a textual change to the amendment that read: "whoever during the commission of any robbery, assault, murder, rape, burglary, kidnapping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce shall be imprisoned."[4] In response to Casey's changes, Representative Poff offered an amendment that would enact a mandatory minimum sentence of one to ten years for a first offense, and five to twenty-five years for any additional convictions.[5] The House passed Poff's amendment, and Congress passed a final

[2] Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 924(c), 82 Stat. 1213, 1223-24.
[3] Ryan Costello, *Stacked Injustice and an Avenue for Relief: The Interplay of "Stacked" 18 U.S.C. § 924(c) Convictions and Expanded Compassionate Release Under the First Step Act*, 100 OR. L.R. 217, 223-24 (2021).
[4] *Id.* at 224.
[5] *Id.*

version.[6] Shortly thereafter, in 1970, Congress lowered the mandatory minimum for a second charge under § 924(c) from five years to two years.[7]

B. The Statute's Expansion

Since § 924(c) was proposed as a floor amendment, its legislative history is scarce. There are no committee reports or congressional hearings that courts could use to decipher legislators' original understanding of how the statute should be interpreted. Although the Court lacked congressional guidance about the statute's application, its early interpretations of § 924(c) were friendly to defendants. For example, in *Simpson v. United States*[8] and *Busic v. United States*[9], the Court decided that defendants could not be subject to an additional penalty under § 924(c) when the underlying charge already contained a sentencing enhancement for use of a firearm.[10] But Congress quickly responded to the Court's "lenience" by passing the Comprehensive Crime Control Act of 1984, which reversed those decisions and allowed § 924(c) to apply to crimes that already contained a sentencing enhancement.[11] Additionally, the Act increased the mandatory minimum sentence for a first violation of § 924(c) to five years, and it raised the second conviction penalty to a minimum of ten years.[12] Not only did these changes significantly increase how long offenders would serve for a conviction under § 924(c), but they also significantly expanded the statue's reach. In doing so, the Comprehensive Crime Control Act initiated a domino effect, which would eventually turn § 924(c) into a highly effective prosecutorial

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[6] *Id.*
[7] Omnibus Crime Control and Safe Streets Act of 1970, Pub. L. No. 91-644, sec. 13, § 924(c), 84 Stat. 1880, 1889-90 (1971).
[8] 435 U.S. 6 (1978).
[9] 446 U.S. 398 (1980).
[10] *Simpson,* 435 U.S. at 6 (holding that a defendant could not receive a sentencing enhancement under both 18 U.S.C. § 2113(d) and § 924(c) in a prosecution arising from a single bank robbery with firearms); *Busic,* 446 U.S. at 399-400 ("We hold that the sentence received by such a defendant may be enhanced only under the enhancement provision in the statute defining the felony he committed and that § 924(c) does not apply in such a case.").
[11] Costello, *supra* note 3, at 226.
[12] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, sec. 1005(a), § 924(c), 98 Stat. 1976, 2138-39.

weapon. Next, in 1986, Congress passed the Firearm Owners' Protection Act, which applied § 924(c) to drug trafficking crimes.[13] By attaching the statute's mandatory minimum sentences to drug crimes as well as crimes of violence, the Firearm Owners' Protection Act opened the floodgates even further. Notably, the political climate at the time also fueled the expansion of § 924(c). During the War on Drugs, the number of individuals who were imprisoned for drug crimes soared,[14] and legislators appeared eager to enhance criminal penalties if an offender demonstrated a willingness to use firearms. Working in tandem, Congress and the Court continued this relentless prosecution of drug offenders.

Soon after extending the reach of § 924(c), the Court ruled in *Smith v. United States* that the word "use" in § 924(c) included exchanging a firearm for drugs.[15] Although this interpretation is clearly at odds with a common understanding of the word "use," the Court chose instead to advance the anti-drug political agenda that permeated the 1980's and '90s.[16] The dominoes continued to fall in case after case. In 2009, the Court found that the penalty for discharging a firearm applied even if the gun was fired inadvertently.[17] Four years later, the Fifth Circuit decided that the definition of "firearm" under the statute encompassed weapons which were not loaded or were broken.[18] Even when the Court tried to curb the expansion of § 924(c) in one instance, Congress overpowered its decision. In *Bailey v. United States,* the Court ruled that the "use" of a firearm required "active employment," rather than just the defendant's mere

[13] Firearm Owners' Protection Act, Pub. L. No. 99-308, sec. 104, 100 Stat. 449, 457.
[14] *Enforcement, Drug and Crime Facts*, BUREAU OF JUSTICE STATISTICS (June 1, 2021), https://bjs.ojp.gov/drugs-and-crime-facts/enforcement (showing that arrests for drug sale or manufacturing violations rose from 137,900 in 1982 to 441,200 in 1989).
[15] 508 U.S. 223, 227-39 (1993).
[16] *See, e.g.,* Ronald Reagan, President, Address to the Nation on the Campaign Against Drug Abuse (Sep. 14, 1986) ("[B]y next year, our spending for drug law enforcement will more than have tripled from its 1981 levels, [and] last year alone over 10,000 drug criminals were convicted. . . .").
[17] Dean v. United States, 556 U.S. 568, 574 (2009).
[18] United States v. Cooper, 714 F.3d 873, 881 (5th Cir. 2013).

possession of it.[19] Shortly thereafter, Congress amended the statute to replace "use or carries" with "uses or carries a firearm, or who, in furtherance of any crime, possesses a firearm."[20] With this change, the statute explicitly criminalized possession of a firearm in connection with an underlying crime, even if the firearm was not accessible or in close proximity.

From the moment of the statue's enactment, § 924(c) was transformed into a highly effective prosecutorial weapon. By 1994, the mandatory minimum penalty for a second conviction was twenty years, and by 2000, it had increased to twenty-five years.[21] The steady stream of congressional enactments and Supreme Court interpretations of § 924(c) stretched the statute far beyond its original purpose of a mild sentencing enhancement for violent offenders.

C. The Introduction of Mandatory Stacked Sentences for First-Time Offenders

After vastly expanding the statute's reach, the Court continued to enhance § 924(c) by amplifying the effect of its penalties. Specifically, the Court held in *Deal v. United States* that first-time offenders qualified for a "second or subsequent conviction" penalty even when both convictions were contained in the same indictment.[22] This decision dramatically changed the landscape of federal sentencing for the next thirty years. By interpreting § 924(c) to require stacked sentencing, *Deal* applied the second conviction penalty even when offenses were committed hours, or even minutes, apart. But this reading completely disregarded the statute's original purpose, which was to punish true second-time offenders. Not only did the Court's

[19] 516 U.S. 137 (1995).
[20] Costello, *supra* note 3, at 230 (2021).
[21] *See* 18 U.S.C. § 924(c) (1994); 18 U.S.C § 924(c) (2000).
[22] Deal v. United States, 508 U.S. 129, 129 (1993) ("The provision also cannot be read to impose an enhanced sentence only for an offense committed after a previous sentence has become final.").

decision negate the primary goal of the recidivist penalty, but it also had a severely detrimental impact on those who received stacked sentences.[23]

Take the case of Weldon Angelos, who received a mandatory increase of fifty-five years and one day under § 924(c) in connection with three controlled buys of marijuana.[24] Angelos, a successful music executive with two young children, brought a handgun to two of those drug deals. The prosecution brought two charges against him under § 924(c) for possessing a firearm during the buys.[25] Police then conducted a search of his home, which revealed additional handguns, so they brought a third charge.[26] Angelos refused the government's plea deal of drug distribution and one § 924(c) conviction (with a mandatory minimum of fifteen years), and instead opted to go to trial.[27] In response, the prosecution introduced a superseding indictment that included multiple § 924(c) charges and a possible penalty of 105 years.[28] Upon his conviction at trial, the court was required to stack these mandatory minimum sentences, ultimately resulting in a fifty-five-year sentence on top of his sentence for the drug crime.[29] Although obligated to impose this punishment, the district court pointed out that the United States Sentencing Commission, an expert agency established by Congress to determine just sentences, only recommended 121 months for all of the combined offenses in this case.[30] In its sentencing opinion, the district court pleaded with Congress to eliminate mandatory stacked

[23] After *Deal*, a second conviction from the same indictment triggered an additional 15 years in prison at the least. 18 U.S.C. § 924(c) (1988) (punishing a first-time offense with a five-year sentence, and any subsequent convictions with a twenty-year sentence).
[24] United States v. Angelos, 754 F. Supp. 2d 1227, 1230 (2004).
[25] *Id.*
[26] *Id.*
[27] *Id.* at 1232.
[28] *Id.*
[29] *Id.* at 1230 (a five-year mandatory minimum for a first conviction and twenty-five years for each subsequent conviction).
[30] *Id.* at 1241.

sentences under § 924(c) for first-time offenders such as Angelos, since they "ha[ve] led to an unjust result in this case and will lead to unjust results in other cases."[31]

In another case, a first-time offender received an additional thirty-two years in prison due to mandatory stacked sentences, even though he did not possess a functional firearm during the crime. In January 2006, Samson Adeyemi drove two accomplices to a fast-food restaurant, where one of the other men brandished an inoperable firearm held together by a rubber band and robbed the cashier.[32] Mr. Adeyemi did not brandish the weapon, nor did he physically steal the money.[33] In fact, he paid for his meals before driving his accomplices away. Adeyemi, a nineteen-year-old immigrant, had no criminal history at the time of his offense.[34] He ultimately chose to reject a plea deal and go to trial, where he was convicted of two § 924(c) offenses—the first conviction tacked on seven years for brandishing a firearm, and the second added an additional twenty-five years since it was a "second or subsequent conviction."[35] In total, the judge sentenced Adeyemi to 385 months in prison.[36] On the other hand, two of Mr. Adeyemi's accomplices accepted plea deals for ninety-six month sentences, and the remaining co-conspirator took a deal for a 129-month sentence.[37] But because of mandatory stacked sentencing, Adeyemi received a vastly longer sentence, despite his much smaller role in the crime.[38] These two examples, of which there are many others, demonstrate just how detrimental stacking was for first-time offenders. Even though the prosecution charged these related crimes in the same indictment, both

[31] *Id.* at 1263.
[32] United States v. Adeyemi, 470 F. Supp. 3d 489, 493 (E.D. Pa. 2020).
[33] *Id.*
[34] *Id.* at 494.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

defendants received the "second or subsequent conviction" penalty, which increased their punishments astronomically.

When § 924(c) was introduced, legislators intended the second conviction penalty to apply to true recidivists. That group would include offenders who had served their time in prison for one § 924(c) conviction, were released, and then committed a second § 924(c) offense. Yet, in practice, courts were required to apply stacked sentences to first-time offenders even if the defendant received multiple § 924(c) convictions in the same proceeding. As a result, stacked sentences severely punished defendants regardless of whether they qualified as recidivists under the original understanding of the statute.

III. Compassionate Release

The compassionate release statute permits courts to reduce an offender's term of imprisonment "after considering the factors set forth in [18 U.S.C.] section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction."[39] But the statute qualifies that any reduction must be "consistent with applicable policy statements issued by the [United States] Sentencing Commission."[40] The applicable policy statement in the sentencing guidelines provides three examples of extraordinary and compelling reasons for compassionate release: (A) if the defendant has a terminal illness, (B) if they are at least 65 years old and suffering from serious physical or mental deterioration, or (C) if they have extenuating family circumstances.[41] In addition to these specific reasons, the application notes to the policy statement include a catch-all provision. The provision provides that the Director of the

[39] 18 U.S.C. § 3582(c)(1)(A) (2000).
[40] *Id.*
[41] U.S. Sent'g Guidelines Manual § 1B1.13 (U.S. Sent'g Comm'n 2018). One example of an extenuating family circumstance given by the policy statement is if the caregiver of the defendant's minor child has died.

Bureau of Prisons can determine if there is an extraordinary and compelling reason "other than, or in combination with, the reasons described in subdivisions (A) through (C)."[42]

On the other hand, the policy statement prohibits courts from considering one reason outright when evaluating motions for compassionate release. That is, the offender's rehabilitation cannot "by itself" be an extraordinary and compelling reason for a sentence reduction.[43] By only limiting judges in this one respect, the sentencing guidelines give significant leeway to courts in deciding what may warrant a sentence reduction for an individual defendant. Additionally, there is no language in the compassionate release statute itself that prevents a court from considering the totality of the circumstances in its individualized assessment. Rather, by directing district courts to consider the § 3553(a) factors,[44] the compassionate release statute encourages judges to assess an offender's entire situation before reaching a decision on the motion.

IV. The First Step Act

The First Step Act,[45] which was enacted in 2018, amended § 924(c) in a profound way. The Act effectively reversed the Court's decision in *Deal v. United States*[46] and eliminated stacked sentences for first-time offenders. Specifically, the First Step Act removed the language in § 924(c) that imposed a "second or subsequent conviction under this subsection," which courts had interpreted to include two convictions from the same indictment.[47] Rather, the statute's new language provides that a second offense penalty only applies to a "violation of this subsection that occurs after a prior conviction under this subsection has become final."[48] With this change,

[42] *Id*. at app. 1(D).
[43] *Id.* at app. 3.
[44] 18 U.S.C. § 3553(a). Some factors explicitly included in the compassionate release statute are the "nature and circumstances of the offense," the "history and characteristics of the defendant," and the "sentencing range established for" this particular crime and defendant "by the Sentencing Commission." *Id.*
[45] First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194.
[46] 508 U.S. 129 (1993).
[47] First Step Act at § 403(a).
[48] *Id.*

courts are no longer required—or even allowed—to stack sentences for first-time § 924(c) offenders. Yet, Congress specified that the First Step Act did not apply retroactively. Therefore, the only instance in which the non-stacking provision applies to offenses committed *before* the Act's date of enactment is where the defendant had not been sentenced by that date.[49] Thus, offenders who received mandatory stacked sentences before the First Step Act do not automatically qualify for early release based on these changes.

V. District Courts Should be Permitted to Consider the Elimination of Stacked Sentencing Under § 924(c) When Evaluating Compassionate Release Motions

Since the First Step Act prohibits its non-stacking provision from applying retroactively, first-time offenders sentenced before 2018 under the "second or subsequent conviction" provision cannot petition courts to disregard their stacked sentences outright. But defendants found a clever way around this limitation. In addition to eliminating stacked sentences, the First Step Act also changed the administrative avenue used to apply for compassionate release. Under the old framework, offenders had to wait for the Bureau of Prisons to file a compassionate release petition on their behalf—a process which could take weeks, months, or longer.[50] The new process allows offenders to file a petition themselves if the Bureau of Prisons fails to do so for 30 days after receiving their request.[51] This procedure gives defendants the opportunity to raise unique arguments justifying their release, and many § 924(c) offenders took advantage of the new administrative route. Although each individual may cite different factors in support of their

[49] *Id.* at § 403(b). ("This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.").
[50] 18 U.S.C. § 3582(c)(1)(A) (2017) ("[I]n any case the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment after considering the factors set forth . . .").
[51] First Step Act at § 603(b) (allowing defendant to file a compassionate release motion "after the defendant has exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier").

release, many offenders have raised one argument in common—that the elimination of stacked sentences under § 924(c) is an extraordinary and compelling reason warranting early release. In response, circuit courts have split on whether the non-retroactive sentencing changes implemented by the First Step Act can be an extraordinary and compelling reason for compassionate release. The courts have landed on three different theories in answering this question. Two of these interpretations would allow the sentencing changes to be taken into account when district courts evaluate compassionate release motions, while the third rejects any consideration of the non-stacking provision.

In one camp, the Third, Sixth, and Eighth Circuits have concluded that district courts should be entirely prohibited from considering non-retroactive sentencing changes in reviewing compassionate release motions.[52] These circuits would bar sentencing changes from consideration regardless of whether they are cited as the sole reason for compassionate release, or if they are cited in conjunction with other factors. Secondly, the First, Fourth, Seventh, Ninth, and Tenth Circuits argue that the First Step Act does not prohibit courts from granting compassionate release in light of the elimination of stacked sentences for first-time offenders.[53] However, among the circuits that apply this broad interpretation of the compassionate release statute, some disagree on another key point. That is, the Ninth Circuit (among others) has ruled that the sentencing changes *in isolation* may justify early release.[54] On the other hand, the Seventh Circuit (and arguably, the Fourth)[55] decided that the sentencing changes may only be

[52] *See* United States v. Andrews, 12 F.4th 255 (3d Cir. 2021), cert. denied, 142 S. Ct. 1446 (2022); United States v. Tomes, 990 F.3d 500, 505 (6th Cir. 2021); United States v. Jarvis, 999 F.3d 442, 444 (6th Cir. 2021); United States v. Crandall, 25 F.4th 582 (8th Cir. 2022), cert. denied, 142 S. Ct. 2781 (2022).
[53] *See* United States v. Ruvalcaba, 26 F.4th 14 (1st Cir. 2022); United States v. McCoy, 981 F.3d 271, 284 (4th Cir. 2020); United States v. Thacker, 4 F.4th 569 (7th Cir. 2021), cert. denied, 142 S. Ct. 1363 (2022); United States v. Howard Chen, 48 F.4th 1092 (9th Cir. 2020); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021).
[54] *Howard Chen*, 48 F.4th at 1092.
[55] *McCoy*, 981 F.3d at 284 ("And we note that in granting compassionate release, the district courts relied not only on the defendants' § 924(c) sentences but on full consideration of the defendants' individual circumstances."). Here,

considered within the § 3553(a) analysis.[56] Therefore, under the Seventh Circuit's interpretation, the non-stacking provision only becomes relevant once an offender has demonstrated a separate and distinct reason for release, apart from the elimination of stacked sentences.[57]

District courts should be permitted to consider the stacked sentencing changes when assessing petitions for compassionate release, whether alone or in conjunction with other factors, for three reasons. First, the compassionate release statute and sentencing guidelines intentionally give courts wide discretion to determine what constitutes an extraordinary and compelling reason for early release. Next, this interpretation does not apply the First Step Act retroactively, which would be against Congress's intent. And finally, the legislative history of § 924(c) better aligns with this interpretation, as the drafters did not anticipate the far-reaching effects of mandatory stacked sentencing at the statute's enactment.

i. Discretion in Evaluating Compassionate Release

In an opinion denying compassionate release to a first-time offender sentenced to consecutive mandatory minimums under § 924(c), the Eighth Circuit claimed that "the compassionate release statute is not a freewheeling opportunity for resentencing based on prospective changes in sentencing policy or philosophy."[58] But nothing in the text of the compassionate release statute, the sentencing guidelines, or the First Step Act suggests that

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the Fourth Circuit suggested, but did not explicitly state, that district courts must also take the § 3553(a) factors into consideration.

[56] *Thacker,* 4 F.4th at 576 ("At step one, the prisoner must identify an 'extraordinary and compelling' reason warranting a sentence reduction, but that reason cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c). Upon a finding that the prisoner has supplied such a reason, the second step of the analysis requires the district court, in exercising the discretion conferred by the compassionate release statute, to consider any applicable sentencing factors in § 3553(a) as part of determining what sentencing reduction to award the prisoner.").

[57] While the Seventh Circuit's argument raises important questions, it is outside the scope of this paper. For the purposes of this paper, I will only explore the major point of division—whether the non-stacking provision can be considered at all when evaluating petitions for compassionate release.

[58] United States v. Crandall, 25 F.4th 582, 586 (8th Cir. 2022), cert. denied, 142 S. Ct. 2781 (2022).

district courts are prohibited from considering the sentencing changes altogether. As noted above, the compassionate release statute explicitly gives district courts discretion in determining what constitutes an extraordinary and compelling circumstance.[59] Further, the statute specifically directs courts to consider the factors set forth in 18 U.S.C. § 3553(a), several of which implicate subsequent developments in the law.[60]

Although § 3553(a) does not explicitly reference subsequent developments in the law, it addresses other considerations that are closely related to sentencing changes. For example, the need for the sentence "to provide just punishment," "afford adequate deterrence to criminal conduct," and "reflect the seriousness of the offense" are all relevant in light of the First Step Act's non-stacking provision.[61] Even more, § 3553(a)(6) encourages courts to account for "the need to avoid unwanted disparities among defendants with similar records who have been found guilty of similar conduct."[62] This factor directly implicates changes made by the First Step Act. Prior to its enactment, defendants involved in nearly identical factual scenarios received sentences that were double or triple the length of what they might receive today. Far from suggesting that non-retroactive changes in the law cannot be considered in compassionate release motions, this statute directs courts to consider many factors which are implicated by the elimination of stacked sentences under § 924(c). Non-retroactivity does not preclude consideration of legislative amendments in the context of compassionate release motions. In fact, doing so would actively work against the goal of the compassionate release process, which is to assess if, and how, changed circumstances may affect a particular individual's sentence.

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[59] *Thacker,* 4 F.4th at 573 ("[D]istrict courts have broad discretion to determine what else may constitute 'extraordinary and compelling reasons' warranting a sentence reduction.").
[60] *See supra* note 44 and accompanying text.
[61] 18 U.S.C. § 3553(a)(2); *see also* United States v. Lizarraras-Chacon, 14 F.4th 961, 967 (9th Cir. 2021) ("The 'seriousness of the offense,' is broad and logically includes any subsequent reevaluation of sentencing issues reflected in legislation.").
[62] 18 U.S.C. § 3553(a)(6).

Further, the sentencing guidelines only provide one restriction to courts evaluating compassionate release motions. That is, rehabilitation *alone* cannot be cited as an extraordinary and compelling reason.[63] Otherwise, district courts have the discretion to consider any circumstances that may warrant an offender's sentence reduction. Much like a totality of the circumstances analysis, compassionate release motions involve a number of factors, some of which may be relevant to the court's decision, and some not. Therefore, in order to perform a thorough analysis, the district court cannot be unduly restricted by the information it receives about a defendant's individual circumstances.[64]

Additionally, the Sentencing Commission has demonstrated that it is willing to provide a categorical bar on what constitutes an extraordinary and compelling reason for early release.[65] As such, if the Commission wants to limit courts from considering the non-stacking provision, it can explicitly prohibit that. Lastly, the text of the First Step Act itself did not purport to prevent courts from taking its changes into account altogether. The Act provided a date prior to which courts could not apply the sentencing changes, but it did not remark on how the non-stacking provision might impact other legislation. Thus, circuit courts should not categorically bar judges from assessing the impact of the sentencing changes in an individual circumstance, as that would frustrate the wide discretion given to district courts in the compassionate release process.

ii. Concerns with Retroactive Application

Some circuit courts have argued that allowing these sentencing changes to affect compassionate release motions would conflict with Congress's intent to limit the reach of the

[63] U.S. Sent'g Guidelines Manual § 1B1.13, cmt. 3 (U.S. Sent'g Comm'n 2018).
[64] *Lizarraras-Chacon*, 14 F.4th at 967 ("[I]n a § 3553(a) factor analysis, a district court must similarly use the *fullest information possible* concerning subsequent developments in the law, such as changes in sentencing guidelines, legislative changes to a mandatory minimum, and changes to a triggering predicate offense. . .").
[65] U.S. Sent'g Guidelines Manual § 1B1.13, cmt. 3 (U.S. Sent'g Comm'n 2018) ("Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.").

First Step Act.[66] But these courts mistakenly assume that allowing legislative changes to have an influence on individual motions is equivalent to complete retroactive application. When district courts consider the effect of the non-stacking provision on particular offenders, it does not give retroactive effect to the First Step Act. Rather than granting early release to all defendants who received stacked sentences under § 924(c), this application would only affect a portion of defendants. To receive compassionate release, offenders would need to demonstrate that the sentencing disparity *in their circumstance* constitutes an extraordinary and compelling reason.[67] Thus, this interpretation would not vacate all qualifying sentences, and the process would maintain the type of individualized assessment that is critical in evaluating compassionate release motions.[68] In comparison, retroactive application would grant early release to *all* first-time offenders sentenced under the stacking provision, regardless of other personal circumstances.

Other circuits have expressed concern that this application of the First Step Act may upend the holistic review aspect of the compassionate release process. For example, in *United States v. McCoy*, the government suggested that courts could now base decisions about compassionate release entirely on the disparity between the sentence actually received and the sentence a defendant would receive today.[69] The Fourth Circuit properly rejected this argument. Instead, the Fourth Circuit described the evaluation process as "the product of individualized assessments of each defendant's sentence" in conjunction with "full consideration of the

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[66] *See* United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021), cert. denied, 142 S. Ct. 1363 (2022) (claiming that Congress put a "clear and precise limitation" on the effective date of the First Step Act's amendment, which prevents it from having retroactive effect); *see also* United States v. Crandall, 25 F.4th 582, 586, 586-87 (8th Cir. 2022), cert. denied, 142 S. Ct. 2781 (2022) (arguing that even though Congress opted to decrease the mandatory punishment under § 924(c), it "did not declare that the previous Congress—decades earlier—prescribed an inappropriate punishment under the circumstances that confronted that legislative body").
[67] *See* United States v. Howard Chen, 48 F.4th 1092, 1100 (9th Cir. 2020) ("[T]he petitioning defendant must still demonstrate that § 403(a)'s non-retroactive changes rise to the level of "extraordinary and compelling" in his individualized circumstances.").
[68] *See* United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020).
[69] *See id.* at 284-85.

defendant's individual circumstances."[70] Additional factors that may, in conjunction with the non-stacking provision, compel early release include the defendant's age at sentencing, the seriousness of the original offense, time already served, institutional records, and commitment to rehabilitation, among others.[71] The government's argument implies that nearly all offenders serving stacked sentences under § 924(c) would be granted compassionate release under this interpretation. But circuit courts have already demonstrated that they reserve compassionate release for truly extraordinary reasons.[72] Thus, this change would likely benefit a small portion of defendants, who face additional personal hardships beyond a sentencing disparity. If districts courts were permitted to consider the non-stacking provision from the First Step Act in evaluating compassionate release motions, it would not guarantee release for any individual offender, whereas retroactive application would do so.[73] Therefore, this interpretation would not contradict Congress's intent to restrict the statute from having retroactive application.

iii. Coherence with § 924(c)'s Legislative History

The legislative history of § 924(c), although minimal, indicates that mandatory stacked sentences are contrary to the statute's original purpose. In its initial form, the statute served as a one-to-ten-year penalty (with a five-year mandatory minimum for recidivist offenders).[74] But following its enactment, the Supreme Court applied the penalties under § 924(c) to many more, and vastly different, crimes. Additionally, legislative enactments by Congress significantly

[70] *Id.* at 286.
[71] *Id.* at 288 ("The courts took seriously the requirement that they conduct individualized inquiries, basing relief not only on the First Step Act's change to sentencing law under § 924(c) but also on such factors as the defendants' relative youth at the time of their offenses, their post-sentencing conduct and rehabilitation, and the very substantial terms of imprisonment they already served.").
[72] Compassionate Release Data Report: Fiscal Years 2020 to 2022, United States Sentencing Commission 4, Table 1 (2022) (data showing that in the year 2021, circuit courts granted between 9.5% and 16.4% of compassionate release motions per month).
[73] *See* United States v. Howard Chen, 48 F.4th 1092, 1101 (9th Cir. 2020).
[74] Costello, *supra* note 3, at 224.

enhanced the sentencing structure within the statute itself. Lastly, the Court decided that the penalty for a second conviction should apply even when the government brings the second charge in the same indictment as the first. Therefore, rather than disregarding congressional intent, it would further the original purpose of § 924(c) to allow district courts to consider the changes made by the First Step Act within the compassionate release context. If district courts are prohibited from reflecting about sentencing disparities, many defendants convicted before 2018 will be required to serve five, ten, or twenty-years more, simply because they were sentenced with an unduly punitive structure in place. Importantly, courts will still possess the discretion to deny compassionate release motions when a defendant presents a danger to society, which aligns with the statute's goal of imprisoning violent offenders with firearms. But for many offenders, the significant expansion of the statute caused them to receive disparate punishment when compared to similar defendants today. By allowing judges to take these sentencing changes into account, courts would be permitted to walk back the excessive penalties under § 924(c) that had drifted far from the original statute's purpose.

VI. Conclusion

When considered together, the compassionate release statute, the sentencing guidelines, and § 924(c) itself suggest that district courts should be permitted to consider the elimination of mandatory stacked sentences when evaluating compassionate release motions. These sources collectively grant significant discretion to judges, who are tasked with assessing the unique circumstances of each offender seeking a sentence reduction. But courts cannot fulfill their role in this process, or make fully informed decisions on these motions, when they are only given partial information. Additionally, this interpretation would not give complete retroactive effect to the First Step Act—a result which Congress clearly intended to prevent. Rather, offenders

petitioning for compassionate release would still be required to demonstrate that the circumstances in their individual case warrant early release. Thus, courts are still able to deny compassionate release when they find it appropriate. As a result, this application of the First Step Act would not conflict with Congress's desire to limit the Act's scope. Finally, the legislative history of § 924(c) indicates that the enacting Congress did not intend the statute's penalties to be so harsh. At the time of enactment, the goal of § 924(c) was to create a mild sentencing increase for true recidivist offenders under the statute. Yet, the statute has strayed far from its original penalty of five years for a second conviction; today, the mandatory minimum sentence for a second violation is twenty-five years.[75] Therefore, district courts should be able to consider this dramatic shift in the statute's sentencing structure when evaluating motions for compassionate release, so that they can reinstate the original purpose of the statute.

The compassionate release process provides a legal avenue for courts to release offenders who have already served an extensive sentence, suffer extenuating circumstances, and have been meaningfully rehabilitated. While I do not suggest a vast expansion of the compassionate release statute, I simply point out that offenders who were penalized by mandatory stacked sentences under § 924(c) have encountered a formidable obstacle that similar defendants do not face today. Ultimately, for some defendants convicted under this provision, the disparity in sentencing, combined with other extraordinary and compelling reasons, warrants compassionate release. Thus, district courts must be permitted to consider the changes made by the First Step Act when evaluating compassionate release motions, given that such an interpretation accords with the text, purpose, and legislative history of the statute.

[75] 18 U.S.C. § 924(c) (2022).

Applicant Details

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Applicant Education

BA/BS From	**Barnard College**
Date of BA/BS	**April 2021**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brittany Zak
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June 12, 2023

The Honorable John M. Walker, Jr.
United States Court of Appeals
Second Circuit
Connecticut Financial Center
157 Church Street, 17th Floor
New Haven, CT 06510-2100

Dear Judge Walker:

I am a rising 3L at New York University School of Law applying to clerk in your chambers beginning in 2025 or for any subsequent term. I have enclosed my resume, unofficial law school transcript, undergraduate transcripts, and writing sample. My recommendation letters will be sent under separate cover. My recommenders are:

1. **Professor Richard R.W. Brooks**, New York University School of Law
   212.998.6619
2. **Robyn Tarnofsky**, Supervising Attorney, NYLAG S.D.N.Y Pro Se Clinic, Adjunct Professor of Clinical Law, New York University of Law
   646.238.5846
3. **Zachary Mazin**, Principal, McKool Smith
   212.402.9414

I served as a Teaching Assistant in Professor Brooks's Contracts and Corporations courses. Professor Tarnofsky supervised my work with litigants at NYLAG's S.D.N.Y Pro Se Clinic. Zachary Mazin is the hiring principal at McKool Smith, where I worked my 1L summer and have returned this summer. He evaluated my work in consultation with each of my assigning attorneys and selected me as a 2022 Diversity Scholarship recipient.

I am interested in clerking for your chambers in particular because of your work in judicial ethics and judicial reforms across the globe.

Respectfully,

Brittany Zak

BRITTANY ZAK

(817) 734-6678 • bnz209@nyu.edu

EDUCATION

New York University School of Law, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.82
Honors: Florence Allen Scholar—a student in the top 10% based on their cumulative averages after four semesters
Activities: First Generation Professionals, Communications Chair
HIV Law Society, Co-Chair

Barnard College at Columbia University, New York, NY
B.A. in Classics and Jewish Studies, *summa cum laude,* April 2021
Cumulative GPA: 4.01
Honors: The 2021 Ingeborg, Tamara, and Yonina Rennert Prize in Jewish Women's Studies
Jean Willard Tatlock Memorial Prize in Latin
Activities: Diverse Sexuality and Gender Alliance at Johns Hopkins University, Pride Month Coordinator

EXPERIENCE

Civil Federal Legal Services Externship, S.D.N.Y. Pro Se Clinic, New York, NY
Intern, January 2023-April 2023
Assisted *pro se* litigants in S.D.N.Y. Drafted complaints, oppositions to motions to dismiss, letter motions to compel, RFAs, and interrogatories. Assessed strength of litigants' claims and advised them about whether to file.

McKool Smith, New York, NY
Summer Associate, June 2022-August 2022, May 2023-August 2023
Drafted memos on evidentiary issues, choice of law questions, joint defense agreements, qui tam claims, and contract interpretation. Attended hearings and expert depositions. Created a digest for a 1000+ page deposition.

Professor Richard R.W. Brooks, NYU School of Law, New York, NY
***Teaching Assistant*,** August 2022-December 2022, January 2023-May 2023
Led review sessions and weekly office hours for Professor Brooks's fall Contracts and spring Corporations courses. Edited supplementary cases and prepared statutory supplements for the Corporations curriculum.

The Workers Circle, New York, NY
College Organizer, September 2020-June 2021
Developed programming to engage more than 250 students in labor rights and racial justice. Prepared students for in-district meetings with Senator Chuck Schumer. Led a teach-in at the Columbia University Tuition Strike.

J Street, New York, NY
National Student Board Representative, June 2020-June 2021
Developed the strategy for J Street U's national campaign for 2020-2021. Wrote and led organizing skills trainings at national conferences. Coordinated campaign strategy with J Street national senior staff.

Lacy Malone Ryder & Menefee, Fort Worth, TX
Legal Clerk, May 2018-August 2018
Drafted mediation settlements and guardianship ad litem documents. Performed legal research for FLSA matters. Managed current case files and conformed outdated files from partners' previous firm to the electronic filing system.

ADDITIONAL INFORMATION

Applying for the first time to join the *Review Of Law and Social Change* as a 3L in August. Enjoy cooking, knitting, and yoga.

Name:	**Brittany N Zak**
Print Date:	**06/08/2023**
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Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	David Simson			
Torts		LAW-LW 11275	4.0	A-
Instructor:	Mark A Geistfeld			
Procedure		LAW-LW 11650	5.0	A-
Instructor:	Helen Hershkoff			
Contracts		LAW-LW 11672	4.0	A
Instructor:	Richard Rexford Wayne Brooks			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	Samuel Estreicher Zachary Dean Fasman			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Corporations		LAW-LW 10223	4.0	A+
Instructor:	Richard Rexford Wayne Brooks			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	David Simson			
Legislation and the Regulatory State		LAW-LW 10925	4.0	A-
Instructor:	Adam B Cox			
Criminal Law		LAW-LW 11147	4.0	B+
Instructor:	Ekow Nyansa Yankah			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	Catherine M Sharkey			
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Health Law		LAW-LW 10797	3.0	A
Instructor:	John V. Jacobi			
Evidence		LAW-LW 11607	4.0	A
Instructor:	Erin Murphy			
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor:	Richard Rexford Wayne Brooks			
Professional Responsibility in the Corporate Context		LAW-LW 12346	2.0	A
Instructor:	David B. Harms			
Antitrust: Merger Enforcement and Litigation Seminar		LAW-LW 12723	2.0	A
Instructor:	Joseph F. Tringali			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation		LAW-LW 10058	4.0	B+
Instructor:	Samuel Issacharoff Arthur R Miller			
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor:	Richard Rexford Wayne Brooks			
Property		LAW-LW 11783	4.0	A
Instructor:	David Jerome Reiss			
Civil Federal Legal Services Externship		LAW-LW 12807	3.0	A
Instructor:	Hans A Romo Robyn Tarnofsky			
Civil Federal Legal Services Externship Seminar		LAW-LW 12808	2.0	A-
Instructor:	Hans A Romo Robyn Tarnofsky			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	58.0	58.0

Allen Scholar-top 10% of students in the class after four semesters

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

BARNARD COLLEGE RECORD - STUDENT COPY

NAME Zak, Brittany N.
ADDRESS ON 4556 Knoll Ridge Dr
ADMISSION Aledo TX 76008-5241
BARNARD ID 1919220
BIRTH DATE 11/25/1998
ISSUE DATE 07/08/2021

ENTERED SPRING 2019 TRANSFER DEGREE BACHELOR OF ARTS, May 19, 2021
FROM Johns Hopkins University
Baltimore, MD
ADVISER Kristina Milnor & Beth Berkowitz
MAJOR AB in Classics(Latin)-Jewish St - Sr Req:Pass w/Dist
HONORS summa cum laude
Dept.Hnrs.1st Major
Dept.Hnrs.2nd Major

TRANSFER CREDIT

JOHNS HOPKINS UNIV 17-18FA		46.0	

SPRING 2019

CLCV UN3230	CLASSICS AND FILM	3.0	A
JWST UN2610	MODERN JEWISH THOUGHT	4.0	A+
LATN GU4152	MEDIEVAL LATIN POETRY	3.0	A+
RELI GU4525	RELIGION, GENDER&VIOLENCE	4.0	A
PHED BC1532	CORE STRENGTH	1.0	P*
		15.0	4.15

On Dean's List for Spring 2019

FALL 2019

CLCV UN3101	ARCHAEOL OF ANC EGYPT &	3.0	A+
HIST UN1002	ANC HIST-MESOPOTAMIA&ASIA MINO	4.0	A
LATN GU4105	LAT LITERATURE OF THE REPUBLIC	4.0	A-
MUSI UN2030	JEWISH MUSIC IN NEW YORK	3.0	A
		14.0	3.98

On Dean's List for Fall 2019

SPRING 2020

CLCV GU4411	EGYPT IN THE CLASSICAL WO	3.0	P*
HIST UN1020	THE ROMANS AND THEIR WORLD	4.0	P*
LATN UN3013	CLASSICAL LATIN PROSE	3.0	P*
RELI UN3206	RELIGION IN THE ARCHIVE	4.0	P*
RELI UN3301	INTRODUCTION TO HEBREW BI	3.0	P*
		17.0	0.00

Due to the COVID-19 pandemic, mandatory Pass/Fail grading was in effect for all students for the spring 2020 semester

FALL 2020

HIST UN2523	HEALTH INEQUALITY: MODERN	4.0	A
HIST UN2611	JEWS & JUDAISM IN ANTIQUI	4.0	A
LATN UN3996	THE MAJOR SEMINAR	3.0	A
WMST UN3450	TPCS IN SEXUALITY & GENDER LAW	3.0	A
		14.0	4.00

On Dean's List for Fall 2020

SPRING 2021

AHIS UN2119	ROME BEYOND ROME	4.0	A
JWST UN3538	JEWS IN THE CITY IN ISLAMIC ME	4.0	A
LATN UN3998	SUPERVISED RSRCH IN LATIN LIT	3.0	A+
PUBH UN1010	COVID-19 PANDEMIC	1.0	A
SDEV UN2000	INTRO TO ENVIRONMENTAL LAW	3.0	B+
		15.0	3.92

On Dean's List for Spring 2021
.
Phi Beta Kappa - April 2021

BARNARD POINTS COMPLETED [GPA]	75.0	4.01
TRANSFER POINTS	46.0	
SUMMER POINTS	0.0	
OTHER POINTS	0.0	
CUMULATIVE POINTS COMPLETED	121.0	

JOHNS HOPKINS UNIVERSITY

ZANVYL KRIEGER SCHOOL OF ARTS & SCIENCES
Baltimore, MD 21218 www.jhu.edu/registrar

UNDERGRADUATE TRANSCRIPT

Student Name	Identifier	Date of Birth	JHU Degree and Date Conferred	Date Printed
Zak, Brittany Nicole	362B6D	11/25/xxxx	xxxxx	5/31/2023

Year of Study	Major		Page 1 of 1
Sophomore	Classics		

Other Major(s)	Minor(s)
Near Eastern Studies	xxxxx

DIV	DEPT	CRSE #	COURSE TITLE	GRADE	CREDITS
Fall 2017			**Advanced Placement Examination**		
			Chemistry AS.030.101		3.0
			Chemistry Lab AS.030.106		1.0
			Chemistry Lab AS.030.105		1.0
			Chemistry AS.030.102		3.0
			Calculus BC AS.110.108		4.0
			Calculus BC AS.110.109		4.0
			Biology (Lab II Waived) AS.020.152		3.0
			Biology (Lab I Waived) AS.020.151		3.0
					TOTAL 22.0
Fall 2017					
AS	CLAS	040.308	Advanced Latin Poetry	A+	3.0
AS	FILM	061.226	Special Topics: Writing About Film	A	3.0
AS	MATH	110.201	Linear Algebra	A	4.0
AS	PHYS	171.101	Gen Physics:Phys Sci Maj I	A-	4.0
AS	PHYS	173.111	General Physics Lab I	B+	1.0
EN	BMED	580.111	BME Modeling & Design	A-	2.0
			TERM GPA 3.85		TOTAL 17.0
			Dean's List		
Spring 2018					
AS	CLAS	040.307	Adv Latin/Latin Prose	A	3.0
AS	NEAS	130.346	Intro to Rabbinic Lit	A	3.0
AS	NEAS	130.373	Prophets and Prophecy in the Bible	A+	3.0
AS	PHIL	150.403	Hellenistic Philosophy	A-	3.0
EN	CHBE	540.503	Independent Research	A	2.0
EN	CLED	661.301	Writing for the Law	A	3.0
			TERM GPA 3.95		TOTAL 17.0
			Dean's List		
Fall 2018					
AS	ARCH	136.101	Intro To Archaeology	A+	3.0
AS	CLAS	040.307	Adv Latin/Latin Prose	A	3.0
AS	GRLL	210.151	Italian Elements I	A	4.0
AS	NEAS	130.440	Elem Biblical Hebrew	A	3.0
AS	POLI	191.335	Arab-Israeli Conflict	A-	3.0
			TERM GPA 3.94		TOTAL 16.0
			Dean's List		
			Withdrawn from University		
			CUMULATIVE GPA 3.91	TOTAL	50.0
			CUMULATIVE CREDITS	TOTAL	72.0

*******End Of Transcript*******

THIS INFORMATION HAS BEEN RELEASED IN ACCORDANCE WITH THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND CANNOT BE FURTHER DISCLOSED TO ANY OTHER PARTY WITHOUT THE PRIOR WRITTEN CONSENT OF THE STUDENT.

The original transcript is in electronic PDF form. A printed copy of this transcript is not an original and is not considered to be an official transcript.

Craig A. Smith

Craig A. Smith, Deputy University Registrar

McKool Smith

Zachary W. Mazin
Direct Dial: (212) 402-9414
zmazin@McKoolSmith.com

One Manhattan West
395 9th Avenue, 50th Floor
New York, NY 10001-8603

Telephone: (212) 402-9400
Facsimile: (212) 402-9444

June 12, 2023

VIA OSCAR

RE: *Letter of Recommendation for Brittany Zak*

Your Honor:

I write to endorse, with enthusiasm, Brittany Zak's application to serve as a clerk in your chambers. Brit worked at McKool Smith during the summer of 2022, between their first and second years of law school at NYU, and will be returning to the firm this summer. Brit is one of the finest summer associates that I have encountered in my 20 years of practice.

There is much I can say to commend Brit to you. Brit is tenacious, curious, and poised. Brit possesses a deep intellect and exhibits a commitment to the craft, clearly born from the extensive advocacy work that they have performed outside of the law, that is rarely seen among summer associates. Brit's manifold academic accomplishments are significant and praiseworthy, but unsurprising to those of us who received their legal research and recommendations last summer. Brit thinks along with, and often ahead of, the assigning lawyer, enabling them to effectively anticipate follow-up questions and identify latent issues. And Brit complements their impressive analytical skills with mature and confident interpersonal skills.

But I want to emphasize that I am not alone in my assessment of Brit's performance. As one of the partners at McKool Smith responsible for hiring, I monitored Brit's progress and received feedback on their work throughout the course of the summer. Here are some of the things that my colleagues had to say about Brit:

- "Best summer associate I've worked with in recent memory."
- "Brit was great at independently figuring out what we needed."
- "In terms of quality of work, Brit was the best summer associate I worked with this year."
- "Brit was great. Extremely efficient and able to dive into complicated topics quickly and produce results without much guidance."
- "Brit was my favorite summer associate."
- "Responsive. Hard working. Always understands the 'ask' and delivers."

And there are more plaudits where those came from. It is easy to see why Brit's time was always in demand, and will be again upon their return to the firm.

I have the greatest confidence in Brit's ability to support your work at the highest level, and I am equally certain that Brit will benefit from your tutelage. I know that their experience clerking in your chambers will meaningfully advance them toward fully realizing their considerable potential. There is no limit on the trajectory of Brit's career.

Thank you for your consideration of Brit's application. I am happy to discuss them further, should Your Honor wish to do so.

Respectfully submitted,

Zachary W. Mazin

New York University
A private university in the public service
School of Law
40 Washington Square South, Room 314I
New York, New York 10012-1099

Telephone: 212 998 6619
E-mail: rrb5@nyu.edu
Richard R. W. Brooks
Emilie M. Bullowa Professor of Law

I am delighted to write this letter of recommendation on behalf of Brit Zak. My initial acquaintance with Brit occurred through two of my large-enrollment black-letter courses—Contracts and Corporations. She has subsequently served as my teaching assistant for both courses. Apart from the classroom context, I have spoken one-on-one with Brit on numerous occasions about her career aspirations and commitments. All told, my extensive interactions with Brit have afforded me a clear view of her personal and professional character, as well as her intellectual ability. Academically, Brit is among the top 1-3% of law students I have encountered, anywhere. Her maturity and personal comportment also place her in the upper echelons of our student body. She is an exceptional young woman and a superb candidate for a clerkship. I recommend her to you with genuine enthusiasm.

When I first met Brit in the fall of 2021 in my first-year Contracts course. She immediately impressed me as being the most thoughtful and well-prepared student in the course. During lectures, she was always engaged and frequently asked challenging questions that indicated uncommon preparation and insight. When called upon to recite factual and legal findings of cases, her articulation was to the point and complete. Her articulation of the cases was equaled by her analysis of the relevant legal issues. She has a strong conceptual mind—quick on her feet yet deeply substantive. In my Contracts course, she earned the second-highest grade (1 point away from the top grade in the course), and in the Corporations course, she earned the highest grade by a noticeable margin. Beyond her raw academic talent, Brit is a go-getter, but never a gunner. Though I think she's usually the smartest person in the room, Brit seems to me more interested in what others have to say than in showing off her brilliance. She is a considerate and careful listener, which I saw firsthand while watching her interact with her peer teaching assistants and our students. She is also an efficient and careful reader. Allow me to illustrate this point in the following paragraph.

This spring, the teaching assistants for my Corporations course were tasked with assisting me in putting together an entirely new set of course materials, as I had become dissatisfied with the existing casebooks. I asked them to read hundreds of cases, identifying pedagogically useful opinions and points, while writing up summaries and insights they drew from these cases. Brit, unsurprisingly, exceeded all of my expectations, which I cannot say of the other teaching assistants, who were perfectly fine but simply not as talented as Brit—a result I have come to expect. While serving as my teaching assistant, Brit could always be counted on to complete assignments carefully. She was never late, and often early, in meeting the deadlines, I established for her. Her work and work habits are very organized. Her writing is clear and

competent. Moreover, Brit showed tremendous follow-through and commitment to the work. She often went beyond the assignment, finding and integrating new information and approaches from articles, statutes, and commentaries.

I am certain that Brit's intellectual capacity and work ethic, along with her research and writing skills, will be a great asset to your chambers. She doesn't require a lot of hand-holding, and she is comfortable working as part of a team. I am happy to give Brit my strongest unqualified endorsement, and I encourage you to contact me if I may provide any further information in support of her candidacy.

Best regards,

Richard R.W. Brooks

NEW YORK LEGAL ASSISTANCE GROUP

Robyn Tarnofsky, Director
NYLAG Legal Clinic for Pro Se Litigants
Thurgood Marshall Courthouse
40 Foley Square, LL22
New York, NY 10007

May 22, 2023

Your Honor:

Re: Clerkship Applicant Brit Zak

I write in enthusiastic support of the clerkship application of Brit Zak, a student who was an extern this past spring semester at the NYLAG Legal Clinic for Pro Se Litigants. Brit spent approximately 12 hours a week working at our clinic under my supervision and attended a weekly seminar during which we discussed issues of federal civil procedure and substantive law relevant to the work at the clinic. Brit worked directly with litigants on matters involving several different areas of federal law, interviewing litigants during intake, drafting correspondence, and performing factual and legal research. Brit thinks creatively, writes clearly, and has strong research skills – Brit was able both to discern the relevant legal issues based on the facts presented by the litigants and to formulate effective research strategies. In addition, Brit has sound judgment, a strong work ethic, and a deep commitment to helping the litigants who come to our clinic for assistance. During our seminar meetings, Brit's contributions to the class discussion tended to be quite insightful. For these reasons, I believe Brit would make an exemplary law clerk.

I was particularly impressed by Brit's work on a case involving special education law, a complicated area with which Brit had no prior experience. Brit worked diligently to gain an overview of the relevant law and to untangle the involved procedural history. Brit then accurately identified several potentially relevant legal issues, researched each of those issues, and determined that only one of them provided the litigant with a viable argument. After confirming these conclusions with me, Brit advised the litigant accordingly. Brit was able to work more independently than many of the other externs, although Brit did not hesitate to ask questions at appropriate times.

Brit is an effective writer and successfully helped a litigant obtain retroactive disability benefits. The litigant was dealing with a severe episode of depression brought on by her son's behavioral issues and her own underlying trauma. Her insurer claimed that because her doctors said she was alert and organized during appointments, she was not impaired enough to qualify for disability benefits. Brit reached out to an ERISA specialist who sometimes works with the clinic to get a better understanding of the relevant legal principles and then drafted a letter to the insurer that explained how the litigant's symptoms worsened as a result of being forced to return to work. The insurer subsequently agreed to provide retroactive benefits.

| 7 HANOVER SQUARE NEW YORK, NY 10004 | TEL: (212) 613 5000 | FAX: (212) 750 0820 | WWW.NYLAG.ORG |

Brit was able to gain the confidence of most clients early on. This is a significant accomplishment, because many of the litigants who come to the clinic would prefer not to work with an extern. Brit was patient but firm with the litigants and explained that the clinic model required litigants to work with externs under supervision of lawyers. Brit was able to win litigants over with a demonstrated mastery of the facts of their cases and the applicable law. Brit showed compassion but did not attempt to sugarcoat the message when delivering bad news to a client. In one Fair Housing Act matter, Brit was able to help move the litigant away from an unrealistic position in mediation by playing devil's advocate, which allowed the litigant to understand, in a concrete way, the weaknesses of her case.

On a personal note, Brit was a pleasure to work with. I would be happy to answer any questions you may have.

Sincerely,

/s Robyn Tarnofsky

WRITING SAMPLE

Brittany Zak
524 E. 20th St., Apt. 6C
New York, NY 10009
(817) 734-6678

The attached writing sample is a memorandum submitted for my Lawyering simulation course as a first-year law student. I have omitted the table of authorities for brevity. I received feedback from my professor on a previous draft of this piece, but the memorandum was not substantially edited by others.

I was assigned the role of a municipal prosecutor opposing a motion to dismiss harassment and disorderly conduct charges against a young man who was aggressively panhandling outside a bank. The defendant had singled out and repeatedly jeered at one bank customer who would not give him money.

TABLE OF CONTENTS

PRELIMINARY STATEMENT

This case is about the right of Brennan Township's citizens to go about their daily lives without fear of being harassed until they "donate" to whomever asks. To that end, the State is charging William Stewart with one count each of disorderly conduct and harassment for incessantly jeering at Millie Robbins over a ten day period while she attempted to conduct her weekly affairs in Cavanaugh Plaza, an outdoor plaza operated by the Cavanaugh Plaza Chamber of Commerce for commercial purposes. The Court should deny defendant's motion to dismiss on the disorderly conduct charge because Cavanaugh Plaza is not a traditional public forum, but rather a non-public forum due to its commercial purpose and function as an ingress/egress space for surrounding businesses. The Court should also deny the defendant's motion to dismiss the harassment charge. William Stewart made repeated, unwanted communications to Millie Robbins with the intent and effect of harassing Millie and causing her annoyance and alarm, satisfying the requirements for harassment under New Jersey law. *See* N.J. STAT. ANN. § 2C:33-4 (West 2021).

STATEMENT OF FACTS

Twice a week, 52-year-old Millie Robbins goes to the ATM at East Brennan Savings Bank at 3 Cavanaugh Plaza, just a block from her job at the local hardware store in Cavanaugh Plaza. Compl. ¶ 1-4; Form MT-158, N.J. DOT Street Improvement Application 1 [hereinafter Application]. Millie had often seen Mr. Stewart, the defendant, on the sidewalk in front of the ATM vestibule door soliciting bank patrons to support his basketball team at the Brennan Community Center, even though the Center has a policy against solicitation. Compl. ¶ 5; Police Rep. 2; Plaza Rules. The Center staff, in fact, were not sure if Mr. Stewart was on a basketball team at all. Police Rep. 2.

After several instances of ignoring Mr. Stewart's persistent requests as he held open the ATM vestibule door, on January 24, 2022, Millie expressly declined for the first time. Compl. ¶ 6-7. This set Mr. Stewart off. The defendant then threatened Millie, saying, "Thanks a lot, Miss One Percent. I see you looking at me and I won't forget!" *Id.* at ¶ 7. Mr. Stewart did not forget. Just three days later, Millie had to return to the bank. Mr. Stewart spotted her again, holding out his hands mockingly as she hurried inside and yelling "Scrooge!" at her as she left. *Id.* at ¶ 8. Mr. Stewart continued to escalate his taunts. On January 31, 2022, Mr. Stewart began chanting "Scroooooge!" at Millie as she approached the vestibule, while she was inside using the ATM, and until she was out of earshot of the bank. *Id*. at ¶ 9. During each encounter, Millie told Mr. Stewart to stop approaching her. *Id*. at ¶ 12. Mr. Stewart's final escalation on the morning of February 3rd drew the attention of a patrolling police officer. Police Rep. 2. Millie, exasperated, still did not succumb to Mr. Stewart's demands for money, instead suggesting that he find work instead of soliciting her. Millie had seen Mr. Stewart taunt other customers as well, calling one man a "stingy tightwad." Compl. ¶ 10-11. Mr. Stewart's response alarmed and annoyed Millie: it was disruptive enough to prompt responding Officer Annabel Smith to file the summons for charges of disorderly conduct and harassment. Police Rep. 2; Compl. ¶ 10. During the initial hearing on this matter, Mr. Stewart's counsel moved to dismiss the harassment charge, claiming that the facts do not make out a charge of harassment. First Appearance Hr'g Tr. 8:1-4 [hereinafter Tr.]. The State has agreed to drop the disorderly conduct charge if the Court finds that Cavanaugh Plaza is a traditional public forum. Tr. 7:8-11.

Cavanaugh Plaza is situated on what used to be the dead end of Concord Avenue between Grant Street and the back entrance of the Municipal Library. Application 1. The Cavanaugh Plaza Chamber of Commerce ("CPCC"), a private entity, oversaw, funded, and

continues to manage Cavanaugh Plaza. CPCC transformed the space (which had been used primarily for parking) into a pedestrian area with access to the surrounding dining, retail, and banking facilities. Application 1-2. CPCC repaved the entire area with antique brick, raised the street to sidewalk level, and closed the space to vehicular traffic using large bollards. Application 1. The Township owns the property but allows CPCC to manage it with its own private security and posted rules. Cavanaugh Plaza Visitor Rules and Regulations [hereinafter Plaza Rules]. CPCC allows only those who have obtained permits from the Township to access the space for gatherings and events, including any fundraising activity. *Id*.

ARGUMENT

The Court has asked for briefing on whether Cavanaugh Plaza is a traditional public forum and whether Mr. Stewart's behavior makes out a charge of harassment. Cavanaugh Plaza is not a traditional public forum because the government's intended use of the space is commercial, its historical and current usage is not analogous to a public right of way, its physical characteristics distinguish it from surrounding public forums, and First Amendment restrictions do not necessarily apply to private actors managing government-owned property. Mr. Stewart's behavior satisfies the elements of the harassment charge because he repeatedly hurled insults known to cause annoyance and alarm with the purpose of harassing another person.

I. Cavanaugh Plaza is Not a Traditional Public Forum

The standard used to evaluate speech restrictions on government property depends on the character of the property in question. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). There are three categories of such public property, each with different degrees of speech protection: traditional public forums, limited public forums, and non-public forums. *Id.* Traditional public forums ("TPF") are spaces that have been "immemorially…held in

trust for the use of the public, and… used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," the quintessential examples being public streets, sidewalks, and parks. *Id.* at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Limited public forums, the second type, consist of "public property which the state has opened for use by the public as a place for expressive activity," e.g. some university facilities and school board meeting rooms. *Perry*, 460 U.S. at 45. Restrictions of expression in TPFs and limited public forums (as long as they remain open for expressive use) are subject to strict scrutiny. *Id*. In contrast, the government has more flexibility to regulate speech in non-public forums, a third category consisting of government property that is not traditionally or otherwise designated as a place for public communication. *Id.* at 46.

Courts identify forum type by considering a variety of factors, none of which alone is determinative. *U.S.* v. *Marcavage*, 609 F.3d 264, 275 (3d Cir. 2010). These factors include purpose, past use, and physical traits. *U.S. v. Kokinda*, 497 U.S. 720, 727-29 (1990). Because the plaza's purpose is commercial ingress/egress, its past use was not for expressive activity (or even much pedestrian use), and its physical traits clearly distinguish it from nearby streets that *are* TPFs, Cavanaugh Plaza is a non-public forum.

A. Forum Status of Government Owned Properties Depends on Intended Purpose

Although public streets and sidewalks are typical examples of TPFs, being a publicly owned street or sidewalk is not sufficient to render a space a TPF. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 114 (1981). This is because the state may be regarded as "a private owner of property, [who] has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. State of Fla.*, 385 U.S. 39, 47 (1966). Thus, the intended purpose of the government property is critical in determining whether it is a TPF, and in cases where expressive activity would disrupt the principal function of the property,

courts are reluctant to deem that property a public forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985).

For example, public sidewalks that are not traditional thoroughfares have been deemed non public forums because they do not serve the purposes associated with TPFs outlined in *Perry*, 460 U.S. at 45-46, even if they are open to the public. *See Kokinda*, 497 U.S. at 727 (holding that a sidewalk adjacent to the parking lot of a post office was a non public forum because its purpose was to provide a pathway for individuals using the post office); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (holding that because the publicly accessible sidewalk was inside a military base, decidedly not a space intended for expression nor traditionally used for communicating thoughts between citizens, it was not a TPF).

1. The Purpose of Cavanaugh Plaza is Primarily Commercial, Not Expressive

The Cavanaugh Plaza Chamber of Commerce, a private entity, oversaw, funded, and continues to manage Cavanaugh Plaza, which was intended to transform a dead end street primarily used for parking into a pedestrian area for accessing the surrounding businesses. Application 1-2. Like the sidewalks in *Kokinda*, 497 U.S. at 727, and *Greer*, 424 U.S. at 836, the plaza's forum status is not determined by its resemblance to a place of public assembly, but rather by its purpose and traditional usage. The fact that it is available for occasional free concerts does not substantially alter its purpose—organizers of concerts and festivals held in the plaza are required to obtain permits by the Township to do so, Plaza Rules, and merely allowing limited expressive conduct to serve commercial interests does not create a TPF. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (holding that the municipality's limited commercial operation of advertising space on a public bus does not render the side of the bus a TFP).

2. Cavanaugh Plaza's Current and Historical Use Shows That it is Not Analogous to a Public Right of Way or Thoroughfare

In a remarkably similar case, the court determined that a public street that had been converted into a commercial ingress/egress space by the city was not a TPF in part because it was not analogous to a public right of way, which is associated with TPF status under *Perry*, 460 U.S. at 45, *Greer*, 424 U.S. at 835, and *Kokinda*, 497 U.S. at 727-28. *See Hawkins v. Denver*, 170 F.3d 1281 (10th Cir. 1999), *cert. denied*, 528 U.S. 871 (1999). *Hawkins* addressed an open air, glass-covered walkway that did "not form part of Denver's automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles, and pedestrians do not generally use it as a throughway to another destination. Rather, the Galleria's function is simply to permit ingress to and egress from the DPAC's various complexes." *Id.* at 1287. Likewise, Cavanaugh Plaza is not a public right of way: it is closed to vehicles, Plaza Rules; it was not previously an area of high foot-traffic, Application 1-2; and it is used primarily to access the commercial offerings surrounding it, *id*. This is not a case of the government reclassifying what was once bustling hub of discourse in order to limit speech, but rather exercising its right as a property holder to permit a third party to transform an underutilized space for the economic benefit of the Township.

B. Cavanaugh Plaza's Physical Features Distinguish it from Surrounding TPFs

Physical characteristics that distinguish a forum from its surroundings can signal to individuals that they are entering an "enclave" with a forum status distinct from that of its surroundings. *U.S. v. Grace*, 461 U.S. 171, 179-80 (1983). Cavanaugh Plaza has distinct antique brick pavement, bollards, signs, and posted rules, all of which demarcate clear boundaries between the plaza and the surrounding streets of the Township, which are traditional public forums. Application 1. These characteristics, like glass covering the open-air walkway in *Hawkins*, point toward Cavanaugh Plaza not being a TPF. *Hawkins*, 170 F.3d at 1287.

C. Private Entities Operating Public Spaces Under Government Permit not Necessarily Subject to First Amendment Restraints

While the city of Denver renovated and manages the Galleria in *Hawkins*, 170 F.3d at 1284, a private entity built and manages Cavanaugh Plaza in accordance with a permit granted by the city. This further strengthens the case against classifying it as a TPF—even regarding what might appear to be the most quintessential of public forums, courts have held that when operated by private entities in accordance with city permits, these spaces are not to be treated like public forums. *See UAW, Loc. No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 910 (4th Cir. 1995) (holding that private entities permitted to use public streets for a festival are permitted to exclude organizations from reserving booths).[1] *See also Nat'l Broad. Co. v. Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1025 (11th Cir. 1988) (allowing similar restrictions on government property leased to a private party).

Similarly, in *Evans v. Newton*, the Court focused not on who owned the property as a legal matter, but *who operated it in reality* to determine whether the exclusion was state action. *See Evans v. Newton*, 382 U.S. 296, 301 (1966) (holding that when the state remained "entwined in the management…of the park" it was still subject to First Amendment concerns). Here, CPCC operates more independently from the state than did the corporation in *Gaston Festivals*, which used the city's police, traffic, and sanitation services to run the event. 43 F.3d at 904. CPCC, on the other hand, provides its own security and funding. Application 2; Plaza Rules.

[1] The Third Circuit has cited this case favorably in terms of state action doctrine, though not yet on this particular forum point. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1156 (3d Cir. 1995); *Groman v. Twp. of Manalapan*, 47 F.3d 628, 640 n.4 (3d Cir. 1995).

II. Stewart Harassed Millie Robbins within the Meaning of New Jersey's Harassment Statute

A. Legal Standard

In New Jersey Municipal Court, defendants may move to dismiss for failure to charge an offense prior to trial. N.J. Ct. R. 7:7-1. A charging document must allege all the facts of the crime charged. *State v. La Fera*, 171 A.2d 311, 314 (N.J. 1961). If the facts alleged do not make out the offense charged, the charge must be dismissed. *State v. Newell*, 378 A.2d 47, 50 (N.J. Super. Ct. App. Div. 1977). The charges should not be dismissed unless the insufficiency of the charging document is palpable. *State v. Weleck*, 91 A.2d 751,755 (N.J. 1952).

B. Stewart's Speech is Governed by Narrow Application of the Statute

In *State v. Burkert*, the New Jersey Supreme Court established a framework for interpreting the state's harassment statute in a way that protects it from constitutional challenges for violating the First Amendment and being void for vagueness. N.J. STAT. ANN. § 2C:33-4 (West 2021); *see generally State v. Burkert*, 174 A.3d 987 (2017). When the statute is being applied to purely expressive speech, it must be construed narrowly so as to avoid constitutional issues. *Burkert*, 174 A.3d at 270. Purely expressive speech refers to speech that is not physically threatening another, not intended to incite imminent unlawful conduct, and not integral to criminal conduct, e.g. a mugger telling a victim to take out their wallet. *Id.* at 1000-01. Because Stewart's speech does not fall into any of those three categories, it is subject to a narrow application of the statute, N.J. STAT. ANN. § 2C:33-4 (West 2021), which proceeds as follows:

C. Stewart's Speech Violates the Statute Even Under Narrow Application

The New Jersey harassment statute states that "a person commits a petty disorderly persons offense if, with purpose to harass another, he: (a) Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in

offensively coarse language, or any other manner likely to cause annoyance or alarm." N.J. STAT. ANN. § 2C:33-4(a) (West 2021). While the State does not argue that the timing was inconvenient or that the communications were anonymous or overly coarse, Stewart did make communications likely to cause annoyance or alarm. The "annoyance or alarm" element of the statute is construed narrowly in light of First Amendment concerns. N.J. STAT. ANN. § 2C:33-4(a) (West 2021); *Burkert*, 174 A.3d at 270.

3. "likely to cause annoyance or alarm" Means to Violate Privacy

In line with First Amendment jurisprudence, the final clause of N.J. Stat. Ann. § 2C:33-4(a) has been interpreted to mean "only those modes of communicative harassment that 'are also invasive of the recipient's privacy[.]'" *Cesare v. Cesare*, 713 A.2d 390, 395 (N.J. 1998) (quoting *State v. Hoffman*, 695 A.2d 236, 236 (N.J. 1997)); N.J. STAT. ANN. § 2C:33-4(a) (West 2021). An important consideration in upholding a right to privacy without running afoul of the First Amendment has been the protection of the "unwilling listener." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (finding that an ordinance that banned picketing at residences was not facially invalid under the First Amendment). In New Jersey, this sentiment has been applied outside of the residential context: repeated, unwanted communications have been deemed to violate recipients' reasonable expectation of privacy even outside the home. *See State v. Graham*, No. A-4920-17T3, 2019 WL 2511210, at *6 (N.J. Super. Ct. App. Div. 2019) (finding a violation of N.J. Stat. Ann. § 2C:33-4(a) after defendant repeatedly asked a woman in a convenience store to come work for him after she continually told him to stop contacting her). *See also Burkert*, 174 A.3d at 1002 (using as an example of harassment a man repeatedly making unwanted comments to a woman in public). This description of privacy invasion mirrors the series of exchanges between Millie and Mr. Stewart, in which Millie repeatedly asked Stewart to stop speaking to her when she came to the bank. Compl. ¶ 12.

4. "likely to cause annoyance or alarm" Interpreted by Considering Totality of Circumstances

The likelihood that this invasion of privacy would cause annoyance or alarm can be decided by factoring in the history of the parties' relationship in a "totality of the circumstances" analysis. *Hoffman*, 695 A.2d at 246–47. This means that the Court should consider Stewart's course of conduct over the multiple episodes described in the Complaint when deciding whether the most recent outbursts violate the statute. N.J. STAT. ANN. § 2C:33-4(a) (West 2021). Millie made it clear that she was annoyed and/or alarmed each time she asked Stewart to stop chanting at her. Stewart knew that his conduct was causing at least annoyance, but he chose to escalate his behavior anyway.

D. Stewart Acted with Purpose to Harass as Required by the Statute

In New Jersey, harassment is a specific intent crime that requires a defendant to act "with purpose to harass another." N.J. STAT. ANN. § 2C:33-4(a) (West 2021). The state interprets "with purpose" to mean it is the person's "conscious object to engage in conduct of that nature or to cause such a result." N.J. STAT. ANN. § 2C:2–2b(1) (West 2021). For harassment, purpose can be inferred "from the evidence presented" and from "common sense and experience" in absence of an admission. *Hoffman*, 695 A.2d at 242–43. Common sense would indicate that Stewart's purpose was not to raise money from Millie, but to harass her: he told her he would not forget her unwillingness to donate and yelled Scrooge at her throughout her withdrawal. Compl. ¶ 7, 9.

Lack of legitimate purpose tilts toward finding a purpose to harass, but the defendant having some other purpose is not dispositive. *Hoffman*, 695 A.2d at 243. That is, even if Stewart claims to have had a purpose to continue fundraising (which is not supported by evidence because it was clear Millie did not want to interact with Stewart or donate), it would not negate his intent to harass. The New Jersey harassment statute was modeled on the Model Penal Code,

which in two subsections restricts harassment to conduct that serves no legitimate purpose of the actor, MODEL PENAL CODE § 250.4(1), (5) (AM. LAW INST., Proposed Official Draft 1962), but the New Jersey statute *does not carry that restriction*. N.J. STAT. ANN. § 2C:33-4 (West 2021); *Burkert*, 174 A.3d at 1000. Even if Stewart did not act with the purpose to harass in one of the initial episodes described in the complaint, he learned that it was annoying her when she repeatedly asked him to stop. Knowing the impact on Millie in advance of the subsequent incidents demonstrates intent. See *C.M.F. v. R.G.F.*, 13 A.3d 905, 910 (N.J. Super. Ct. App. Div. 2011) (holding that the defendant had the requisite intent for harassment because he should surely know that berating his wife at his child's basketball game would annoy and disturb her, and that his claim that he was expressing anger did not negate his intent).

CONCLUSION

Because Brennan Township is acting in its capacity as a property owner to allow a private entity to manage a space that is primarily commercial in purpose and not akin to a public thoroughfare, Cavanaugh Plaza is not a traditional public forum. Further, even when applying a very restrained interpretation of the harassment statute, Stewart's conduct violates subsection (a) because making repeated communications to unwilling listeners constitutes an invasion of privacy, meaning that Stewart made a communication in a manner likely to cause annoyance or alarm. N.J. STAT. ANN. § 2C:33-4(a) (West 2021). The requirement that Stewart acted with intent to harass is satisfied because it was clear that Millie was annoyed by this behavior and his alleged alternate purpose to fundraise does not negate his clear intent to harass. For these reasons, we ask that the Court deny the defendant's motion to dismiss on all charges.